PUBLIC PROSECUTOR v. KARUMAH

[R.Cr.J. (Harun J.) March 7, 1980]

[Kuala Lumpur — Federal Territory Criminal Revision No. 9 of 1980]

Criminal Law and Procedure — Application for adjournment — Investigation completed — Witnesses absent — Adjournment should be granted.

In this case the accused was charged with three offences of cheating alleged to have been committed in March 1977. There were a number of postponement of the trial, which was eventually fixed for the February 27, 1980. On that day the prosecution applied for a postponement as they were unable to produced the witnesses, who were untraceable. The defence asked for a discharge and the learned President of the Sessions Court referred the case to the High Court for directions.

Held: as the investigation had been completed in this case and as the adjournment was asked for to enable the prosecution to get the witnesses, the court should grant the adjournment.

Cases referred to:-

(1) *Public Prosecutor* v. *Hettiarachigae L.S. Perera* [1977] 1 M.L.J. 12.

(2) *Public Prosecutor* v. *Tan Kim San* [1980] 1 M.L.J. 99.

CRIMINAL REVISION.

John L. O'Hara (Deputy Public Prosecutor) for the Public Prosecutor.

Sri Ram (*Kumar* with him) for the respondent.

Harun J.: In this case the accused was alleged to have committed three offences of cheating under section 420 of the Penal Code in March 1977 in connection with transactions concerning land. There have been many postponements of his trial. In the beginning the postponements were at the request of the prosecution on the ground that investigations had not been completed. This is not surprising as the accused was arrested within 24 hours of the complaint being made to the police and charged in court 11 days later. The defence had on each occasion asked for a discharge but this was refused by the court. Later the postponements were at the request of the defence as counsel was engaged in other courts. His last appearance was on February 27, 1980, nearly three years after his first appearance in court.

On that day the prosecution applied for a long postponement on the ground that although the investigation had now been completed they were unable to produce the witnesses at the trial for the following reasons:

(i) 10 prosecution witnesses including the three complainants are untraceable; and

(ii) the investigating officer is now in London reading law and is not expected to return to this country until December 1980.

The defence again asked for a discharge but the learned President said: "I think I am in a dilemma as to whether I should order a discharge not amounting to an acquittal or to postpone the case". He granted a short adjournment and referred the case to this court for directions.

The reason for the learned President's predicament was that it appeared to him that there is a conflict in the decision of *Public Prosecutor* v. *Hettiarachigae L.S. Perera*[1] with that of the recent decision in *Public Prosecutor* v. *Tan Kim San.*[2] With respect, there is no such conflict but there is a difference. And the difference is this. In *Perera's* case it was held that the court should not exercise its powers of discharge under section 173(g) of the Criminal Procedure Code if the police are not ready to proceed with the trial due to the absence of witnesses or other reasons. It may be recalled that in that case the initial postponements were because witnesses were not present in court. It is true that when the defendant was charged again the prosecution applied for a postponement on the ground that investigations had not been completed but it was the finding of the court that that reason was not believed and consequently was not accepted. In *Tan's* case, however, the decision was that the court should exercise its powers of discharge under section 173(g) Criminal Procedure Code if the prosecution asks for a postponement on the ground that investigations had not been completed for the simple reason that if the investigation had not been completed then the prosecution had no grounds to prefer a charge and the charge is therefore groundless.

Briefly, the procedure is as follows:

(i) If the investigation had *not* been completed then the court should apply *Tan's* case and refuse the application for a postponement on this ground and discharge the accused not amounting to an acquittal under section 173(g) Criminal Procedure Code.

(ii) If the investigation has been completed but the prosecution applies for a postponement on the ground that witnesses are absent or cannot be traced; or that the chemist or medical reports had not been served on the accused; or on such similar ground which prevents the trial from commencing, then the court should apply *Perera's* case and grant the postponement. If the case is long outstanding then the court should report the matter to the Public Prosecutor who may in his discretion exercise his powers under section 254 Criminal Procedure Code to withdraw the charge.

In the present case, whatever may be the position earlier, it is clear that the investigation has now been completed and therefore the decision in *Perera's* case applies. Apart from avoiding repetitive prosecutions as happened in *Perera's* case, courts should also bear in mind that discharging cases because of absent witnesses could easily encourage the criminal world to spirit away prosecution witnesses to frustrate trials. Should this happen then the administration of justice will be a mockery. The police on the other hand should look out for such eventualities and prevent their occurrence.

I direct that the learned President grant the postponement in this case as requested by the prosecution but would advise him in the meantime to report the circumstances of the case to the Public Prosecutor.

Order accordingly.

Solicitors: *Sri Ram & Co.*